IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-54

JAMES L. KEENER, *Petitioner,*

vs.

STATE OF KANSAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF KANSAS

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No.

JAMES L. KEENER, Petitioner,

vs.

STATE OF KANSAS, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

The petitioner, James L. Keener, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Kansas entered on May 6, 1978.

OPINION BELOW

The Supreme Court of the State of Kansas rendered its opinion on May 6, 1978. The opinion is reported at 224 Kan. 100 (1978). A copy of the opinion reversing the judgment of conviction and sentence of the petitioner with prejudice and ordering him discharged, but affirming the judgment in all other respects is attached as Appendix H.

JURISDICTION

The judgment of the Supreme Court of the State

of Kansas was entered on May 6, 1978. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C., 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Is it constitutional and consistent with federal law for the state in the discharge of its constitutional duty to provide defense services to the indigent, to obligate a lawyer to subsidize the state by providing free legal services to a defendant in an unlawful prosecution, so known to be by the state before substantial defense services were rendered, and which is nevertheless conducted through trial and appeal contrary to an absolute federal statutory bar and despite repeated and timely objection?

2. Is it constitutional and consistent with federal law for a state to charge to an indigent defendant as a personal judgment its expenditures in the defense of such an unlawful prosecution, including assigned counsel fees, and may it do so without a hearing, without an opportunity to defend, and without intervention of a judicial officer, notwithstanding that all charges were automatically dismissed with prejudice under the terms of the specific federal statute?

3. Whether this Court in the exercise of its equitable powers, or ancillary to its appellate jurisdiction, or under any federal law may order reasonable compensation for legal services rendered on appeal in this Court by an indigent defendant's Court appointed attorney in an unlawful prosecution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, Constitution of the United States:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Amendment XIII, Sec. 1, Constitution of the United States:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment XIV, Sec. 1, Constitution of the United States:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 18, United States Code, Appendix, Interstate Agreement on Detainers (1970) Article IV(e):

> If trial is not had on any indictment, in-

formation or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Title 42, United States Code, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Kansas Statutes Annotated, Section 22-4503:

It is the duty of an attorney appointed by the court to represent a defendant, without charge to such defendant, to inform him fully of the crime charged against him and the penalty therefor, and in all respects fully and fairly to represent him in the action.

Kansas Statutes Annotated, Section 22-4507 (Supp. 1977)

An attorney who performs services for an indigent person, as provided by this act, shall at the conclusion of such service or any part thereof be entitled to compensation for his or her services and to be reimbursed for expenses reasonably incurred by such person in performing such services.

Kansas Statutes Annotated, Section 22-4513 (Supp. 1977)

Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by K.S.A. 1976 Supp. 22-4510, such defendant shall be liable to the State of Kansas for a sum equal to such expenditure, and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. Within thirty (30) days after such expenditure, the judicial administrator shall send a notice by certified mail to the person on whose behalf such expenditure was made, which notice shall state the amount of the expenditure and shall demand that the defendant pay said sum to the state of Kansas for the benefit of the fund to aid indigent defendants within sixty (60) days after receipt of such notice. The notice shall state that such sum became due on the date of the expenditure and that the sum demanded will bear interest at six percent (6%) per annum from the due date until paid. Failure to receive any such notice shall not relieve the person to whom it is addressed from the payment of the sum claimed and any interest due thereon.

Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, the judicial administrator shall certify an abstract of the total amount of the unpaid demand and interest thereon to the clerk of the district court of the county in which counsel was appointed or the expenditure authorized by the court, and such clerk shall enter the total amount thereof on his or

her judgment docket and said total amount, together with the interest thereon at the rate of six percent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment under the code of civil procedure and shall become a lien on real estate from and after the time of filing thereof. A transcript of said judgment may be filed in another county and become a lien upon real estate, located in such county, in the same manner as is provided in case of other judgments. Execution, garnishment, or other proceedings in aid of execution may issue within the county, or to any other county, on said judgment in like manner as on judgments under the code of civil procedure. The exemptions provided for in the code of civil procedure shall apply to any such judgment.

STATEMENT OF THE CASE

A criminal complaint was filed in Harvey County, Kansas on September 20, 1974, charging the petitioner with burglary, robbery, assault, and attempted murder. Federal charges arising out of the same incident were filed at about the same time and on April 7, 1975, petitioner pleaded guilty to the federal charges, was subsequently sentenced, and placed in the U. S. Penitentiary at McNeil Island, Washington.

On May 9, 1975, Sedgwick County, Kansas, filed a request for temporary custody of the petitioner under Article IV of the Interstate Agreement on Detainers, for prosecution on outstanding charges on another crime. Harvey County filed an identical request with federal authorities on August 6,

1975. Later the federal warden offered custody of the petitioner to the state of Kansas pursuant to the agreement, and following procedures set forth in the Kansas Governor's Extradition Manual (1972), Harvey County accepted the offer of temporary custody and on September 20, 1975, petitioner arrived in Kansas pursuant to such rendition procedures. All forms used by Harvey and Sedgwick County were taken from the Kansas Governor's Extradition Manual.

Petitioner was arraigned in the Harvey County Court on September 22, 1975, and counsel was appointed and thereafter he was returned to Sedgwick County where he had been jailed upon arrival in Kansas. Petitioner was not again physically present in Harvey County until January 20, 1976, and no substantial services were rendered in his defense by his court appointed attorney until after December 9, 1975.

On November 10, 1975, petitioner pleaded guilty to the Sedgwick County charges and Sedgwick County returned petitioner to the McNeil Island federal prison on December 9, 1975, even though they knew of the pending Harvey County charges. All prosecution of the petitioner on then pending Harvey County charges were after this date barred, under Article IV(e) of the Agreement on Detainers as hereafter explained. At no time before such return did the Sedgwick County prosecutor receive notice from the Harvey County prosecutor, either orally or in writing, that Harvey County wanted to prosecute the petitioner when Sedgwick County was finished with him.

The Harvey County prosecutor learned of the return as also did petitioner's attorney. The prosecutor took steps to regain custody of the petitioner and petitioner's lawyer, upon learning

of these attempts on January 12, 1976, immediately took steps to resist, asking the prosecutor for notification of any new proceedings to regain custody, and on January 16, 1976, filed a Motion to Dismiss for failure to comply with the Agreement on Detainers, requesting a hearing at the earliest possible time. Notice was immediatley served on the County Attorney. The motion specifically alleged the requirement of dismissal with prejudice set forth in Article IV(e). Nevertheless, no hearing was provided and no opportunity to resist the second rendition was afforded, and the petitioner was flown back to Harvey County, Kansas, by commercial air line on January 20, 1976, without any attempt being made to comply with any rendition procedures.

This was done pursuant to a form entitled Evidence of Agent's Authority to Act for Kansas, directed to W. H. Rauch, Warden of the U. S. Penitentiary, signed by Richard C. Morgan, the prosecutor, and Jim Marquez, the Governor's adminstrator of the Agreement on Detainers, designating the officers named therein to take custody of the petitioner at the McNeil Island penetentiary on January 19, 1976, for his return to Kansas for trial. (Appendix A) Such form was executed without the necessary supporting rendition proceedings because none were possible, there having been a prior rendition under the agreement.

Independent of the petitioner's motion and objections specifically raising the statutory bar, and notwithstanding any pretended later reliance on the clearly erroneous trial court rulings, the prosecutor and the Governor's administrator of the Agreement on Detainers were at that time inescapably aware that the decision to prosecute,

and the second rendition, was contrary to law by a simple reading of the agreement and the Kansas Governor's Extradition Manual, which was used as the source for forms and instructions under the agreement, at page 90 contains the following instructions to prosecutors:

> Once an inmate is returned to his original place of imprisonment, no further proceedings under the Agreement are possible and any indictments, informations, or complaints still pending will be dismissed with prejudice.

Evidence was presented on the Motion for Dismissal in the County Court on January 23, 1976. Richard C. Morgan, the prosecutor, was present and resisted the motion. He was called as a witness by the petitioner and testified to the second rendition. Counsel for petitioner argued the applicability of the Agreement on Detainers Act as both Kansas and federal law and argued that it was an absolute bar to prosecution under Article IV(e) because of the prior return and because of the running of the statutory 120 day trial limitation period in violation of Article IV(c) and V(c) of the agreement.

The motion was overruled and after preliminary hearing the petitioner was bound over for trial. Petitioner was arraigned in the District Court on February 9, 1976, and two days later, on February 11, 1976, petitioner's lawyer wrote to the Kansas Indigent Fund informing said fund of the highly unusual situation and that "very substantial services" would be required. This letter explained the application of the absolute bar to prosecution set forth in Article IV(e) and stated:

> "In view of this language it would appear to be a waste of time and of taxpayer's money

to further prosecute the defendant in view of the fact that he has already received two federal sentences of 50 years each and a 25 year sentence. Nevertheless, the County Attorney has determined that he should proceed in spite of the rather clear language contained in Article IV(e) of the Interstate Agreement, and of course, I have no choice but to defend against these attempts to prosecute the defendant, and this may require me to file a proceeding in the Federal District Court to enjoin the prosectuion . . ."

This letter also stated:

"I have been told that the State Indigent Fund is running quite low on funds, so I would also like to know in what manner in particular I should handle this so that I can be sure to obtain payment for my services, because there is no way in which this particular [case] can be handled without expectation of reasonable payment for services rendered."

The judicial administrator's letter in response, dated February 23, 1976, did not speak to the inadvisability of prosecution, but as to compensation stated:

"If the Judge determines this case to be an exceptional case, and by approving your claim determines that the amount of the claim is reasonable for the services rendered as being necessary for the defense of the indigent defendant, we can process it if the amount does not exceed $9,000.00. Of course, this is conditioned upon available funds and legislative appropriations."

A motion similar to the previous county court

motion to dismiss with prejudice was filed on February 27, 1976, and evidence on the unlawful rendition was again presented on March 25, 1976. Mr. Richard C. Morgan, the prosecutor, was present at this hearing and resisted this motion. He was again called as a witness by the petitioner and again testified to the second rendition, most notably as follows:

Q. Mr. Morgan, would it be a correct statement to say that when the defendant was returned to Harvey County on or about the 20th of January, 1976, that that would have been the second time that he was returned to Harvey County, Kansas, for prosection on these charges?

A. Yes, I believe that is correct.

This court, having declared the Kansas recoupment law unconstitutional in James v. Strange, 407 U.S. 128, 32 L.Ed.2d 600, 92 S.Ct. 2027 (1972), the Kansas legislature on April 21, 1976, amended that law to eliminate only the discriminatory exemption which was the only constitutional defect dealt with in that case, and the revised law went into effect July 1, 1976.

The court overruled the motion on September 1, 1976, (Appendix B) after the 120 trial limitation period had once again expired, after the hearing of March 25, 1976. After the September 1, 1976, ruling the defendant requested and was granted a continuance to prepare for trial. There were no prior continuances in open court or at the request of the petitioner or acquiesced in by him, as shown by the record. Trial was had on December 7, 1976, and the petitioner was found guilty (Appendix C). A motion to arrest judgment was

thereafter filed, argued on the basis that prosecution was barred under federal law and was unlawful, and was by the court overruled, and the petitioner was sentenced, after which the petitioner moved that the court order compensation for his lawyer, without regard to the state indigent fund payment limits, on the the ground that this had been an unlawful prosecution, and in such cases there was a constitutional right to adequate compensation under the due process clause of the constitution. Petitioner's lawyer submitted evidence into the record of his time, of the reasonable value of his services by affidavits concerning exceptional case, and also by affidavits of two practicing attorneys from Harvey County, Kansas. The state submitted no evidence of reasonable value of services. The court overruled this motion on the ground that it would be bound by the indigent fund payment limitations (Appendix C).

An attorney's voucher was submitted which was reduced by the court to the indigent fund payment limits to $3,930.95, applying rates lower than those charged by office equipment repairmen, as shown by the evidence submitted, leaving the sum of $5,187.00 in fees unpaid, but the court did not question the time that had been devoted to the case nor that such time was necessary nor that the amount requested was reasonable for the services rendered. Petitioner's attorney requested, and was granted, a hearing on additional compensation before the board of supervisors of the state aid to indigent defendant's fund, pursuant to Kansas Supreme Court rule #404, (220 Kan. cviii) and thereafter by letter dated May 10, 1977, the judicial administrator advised petitioner's lawyer that "the board has disallowed the balance of $5,187.00 or any other additional compensation." This rule states that such decision is final and K.S.A. §22-4503 prohibits any other

or further attorney fee charges directly to the petitioner.

An appeal on the conviction and on the fee request denial was taken to the Kansas Supreme Court on February 22, 1977.

On April 6, 1977, the judicial administrator demanded recoupment from the defendant for the state's expenditures in his defense (Appendix D). On May 10, 1977, the judicial administrator made an additional demand for recoupment for the state's expenditures in the defense (Appendix E). On August 1, 1977, the petitioner, having failed to comply with the demands for recoupment, the judicial administrator summarily, without further notice, hearing, or intervention of a judicial officer, entered judgments against the petitioner (Appendix F and G). Kansas law has no provision for appeal from the entry of such judgments and Kansas appellate courts have jurisdiction to review only the acts, orders or judgments of a court. K.S.A. §60-2101.

Kansas law provides that the judicial administrator is directly responsible to the Kansas Supreme Court to serve at the will of the justices, to perform such duties as provided by law or assigned to him by the Supreme Court. Thus, he is directly under Supreme Court control and is an employee of said court. K.S.A. §20-318. Kansas law further provides that the members of the board of supervisors of panels to aid indigent defendants are appointed by the Chief Justice of the Kansas Supreme Court and one of the justices of the Supreme Court must be included on the board. Thus said fund is also under Supreme Court control. K.S.A. §22-4514.

On appeal the petitioner argued that the pros-

ecution had been unlawful under both federal and state law, the Agreement on Detainers, for two reasons, first, that the agreement allows for only one rendition, and second, that the 120 day trial limitation period had elapsed, not once but twice, without trial, that prosecution had in fact been conducted contrary to the federal Civil Rights Act, 42 U.S.C. §1983, in that the petitioner had federal immunity from prosecution by virtue of the Agreement on Detainers, Article IV(e) and V(c), that the failure of the state to provide any screening mechanism whatsoever to prevent unlawful prosecution was itself a due process violation, that since the petitioner's lawyer had been pressed into service or conscripted to render services in an unlawful prosecution the court was duty bound under the constitution and the federal Civil Rights Act to order compensation in reasonable amount according to evidence, without regard to indigent fund payment limitations, that to fail to adequately compensate court appointed counsel in the unlawful prosecution chills the effectiveness of counsel unconstitutionally, that the state was solely and totally liable for the cost of the defense, and that the recoupment judgments entered against the petitioner by the judicial administrator were void because the petitioner was not liable for the state's defense expenditures in such a case under the due process clause, and because he had been afforded no hearing before entry of the judgments on the issue of his liability, and the state therefore had not observed the minimum due process procedural safeguards.

At no time in the course of the proceedings, either before the trial court or on appeal, did the state contend that the Agreement on Detainers was not binding or valid or that it was inapplicable or that the petitioner had waived its pro-

visions.

On May 6, 1978, the Kansas Supreme Court ruled that the statute was clear and mandated a dismissal, that the prosecution was indeed barred by the interstate Agreement on Detainers, binding both on federal and state governments, and reversed the convictions and ordered the complaints dismissed with prejudice and the petitioner discharged (Appendix H). The ruling was based on the identical reasoning that had been repeatedly argued by petitioner, both before the magistrate and the trial court judge. The court, however, denied the constitutional right to compensation and upheld the constitutionality of the entry of of the judgment without intervention of a judicial officer and without a hearing. The court below thus recognized that both issues raised by this petition had been properly raised and presented for review as a part of the criminal appeal, and the court rendered its decision against the petitioner on both issues (Appendix H). There has been no request for a rehearing, the statutory time therefor has passed, and there has been no reversal.

The attorney for the petitioner asked for allowance of his voucher for services rendered on appeal according to the evidence of reasonableness shown in this case, and the departmental justice on April 10, 1978, reduced the amount allowed to $2,801.37, leaving the sum of $3,615.00 in fees unpaid, citing unavailability of funds, but not denying the propriety of the amount requested and not questioning the time that the petitioner's attorney had devoted to the case, nor questioning that such time was necessary (Appendix I). Petitioner's attorney, again by letter dated April 5, 1978, asked for reconsideration by the board of supervisors of the aid to indigent defendants

fund. No hearing or reconsideration was given and no response to this request was ever received.

Thereafter, by letter dated May 24, 1978, the judicial administrator made an additional demand for recoupment upon the petitioner, warning that another judgment would be entered if said demand is not complied with (Appendix J). The petitioner, by letter to the judicial administrator, dated May 25, 1978, requested a hearing on the issue of his liability and has been informed by the judicial administrator's letter dated June 9, 1978, that no hearing is provided for under the statute, and none will be afforded.

The corresondence involving the judicial administrator pretaining to the fees issue, the recoupment, requests for hearings, vouchers, etc., have been made a part of the files and records of the trial court and the Kansas Supreme Court.

REASONS FOR GRANTING THE WRIT

I. *The Court should review this case to consider the question whether a state can deny compensation to a court appointed lawyer for services rendered in an unlawful prosecution.*

That the prosecution of the petitioner in this case was unlawful is amply shown from the fact that in his own testimony on two different occasions the prosecutor admitted the facts which made the federal statutory bar applicable. That such prosecution was known to be unlawful and therefore not in good faith is shown by a simple reading of Article IV(e) of the Agreement on Detainers and from the fact that the instructions to prosecutors in the Kansas Governor's Extraditional Manual, from which the prosecutor took his

forms, at page 90 clearly stated that under the facts given, the complaint was dismissed with prejudice. That petitioner made repeated timely objection is shown by the numerous motions and hearings held, the first such motion requesting hearing at the earliest possible time being filed even before the unlawful action began. Petitioner's attorney even asked for prior notice of any new rendition proceedings. Despite this, the petitioner was returned to Harvey County pursuant to authority granted by the prosecutor and the Governor's administrator of the Agreement on Detainers (Appendix A) without rendition procedures and with no opportunity given to resist the second rendition. At no time did the prosecution contend that the Agreement on Detainers was not binding or valid or that it was inapplicable or that the petitioner had waived its provisions. The eventual holding by the court below dismissing the complaint with prejudice is a conclusive finding that the prosecution was unlawful under both state and federal law.

Quite significantly, petitioner's lawyer was appointed long before the prosecution became unlawful. No substantial services were rendered until after the prosecution was unlawful. By that time the entire character of the case had changed since the time of acceptance of the original appointment. That was why counsel wrote to the indigent fund on February 11, 1976. He had to make sure that the fund knew that adequate compensation had to be provided for. Despite the commitment to reasonable compensation by the judicial administrator in his letter of February 23, 1976, in which he stated that this might be considered an exceptional case, it is indeed difficult to see how the case was treated as in any way exceptional.

Our research reveals no case involving the duty of court appointed counsel to defend against an unlawful prosecution without compensation. While there are many cases holding that lawyers have a duty as officers of the court to defend the indigent even without compensation, invariably the cases assume the prosecution to be lawful, and in no case have we found the issue presented where the prosecution was barred by some rule of federal or state law. We therefore believe that this case is one of first impression in American jurisprudence.

When a system designed to regularly, openly, and brazenly leave appointed lawyers uncompensated, is applied in an unlawful prosectuion to a defendant who has a very uniquely immediate and pressing need for a highly unusual legal service, that is as it were to single handedly bring the state to the bar of justice to answer for its own wrong under circumstances where it is by that means, and that means alone, that he can make a defense, then there is impermissable interference with the right to counsel in violation of the 6th amendment and 14th amendment due process as mandated by Argersinger v. Hamlin, 407 U.S. 25, 32 L. Ed.2d 530, 92 S.Ct. 2006 (1972) and Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963) and there is an involuntary servitude, a taking of property without just compensation and without due process of law. The state took the traditional ethical obligations established by the bar and twisted them around and imposed them on the defendant's lawyer to its own benefit to lessen the financially chilling and burdensome effects that the Kansas recoupment law otherwise would have had in this unlawful prosecution on the petitioner's 6th amendment rights to assistance of counsel.

In the syllabus written by the Court, No. 3, the Court says that "The State is not liable for attorney's fees for representation of an indigent defendant in a criminal action except as provided in the Aid to Indigent Defendants Act." Underlying that conclusion is the fallacy that under no circumstances can the state have any liability for consequences of an unlawful prosecution.

In the main body of its decision the court says that this act "has not cancelled the attorney's ethical responsibility to provide representation without compensation if necessary." Petitioner does not question the ethical responsibility of lawyers to take court appointments and perform services for indigent defendants, but the state is the provider of the service as held by the Gideon and Argersinger cases, and the lawyer is the performer of the services and not the provider. The court's holding is even obviously inconsistent with K.S.A. §22-4507 which specifically recognizes an attorney's right to compensation and in addition, in the original enactment of that section as part of the Aid to Indigent Defendants Act, the Kansas legistlature specifically recognized that compensation of a defendant's court appointed attorney is a due process and equal protection matter when in the introductory paragraph it stated that "It is the purpose and intent of the state of Kansas to supply all persons charged with crimes under the laws of the state the full and complete protection required by due process of law and the equal protection of the laws." Kansas Session Laws, 1969, ch. 291, p. 786. Nevertheless, the court below goes so far as to say that an attorney can be required to serve without compensation if necessary, despite that statute and the policy it recognizes. The court makes it clear that it holds that appointive lawyers have no right to compensation except

such as the state voluntarily chooses to give them, without regard to whether the prosecution was ever in fact lawful in the first place and no matter how reprehensible the state's conduct may have been. Surely the state cannot pronounce itself the beneficiary of the traditional ethical responsibility of lawyers to defend the indigent without pay when its own prosecution has been unlawful. To permit this would sanction a clear invidious discrimination against lawyers in violation of the equal protection clause and the due process clause of the constitution.

One need not dispute the traditional obligations of the legal profession to understand that a lawyer's obligations without compensation to help the state out with its constitutional duty to provide defense services to the indigent, ends as a matter of constitutional right when an unlawful prosecution begins, especially if it is knowing and in disregard of a federal statutory bar of which the prosecution has specific prior knowledge. The court should therefore limit the no compensation rule to those situations where the state prosecution has been in good faith.

II. The Court should review this case to consider the question of whether a state can recoup its expenditures in providing defense services in an unlawful prosecution.

In James v. Strange, 407 U.S. 128, 32 L.Ed.2d 600, 92 S.Ct. 2027 (1972) this Court overturned the Kansas recoupment law because it was invidiously discriminatory in violation of the equal protection clause of the constitution in that it denied indigent defendants the exemption rights available to other judgment debtors. The Kansas legislature has since amended the statute to eliminate only that particular invidious discrimination. This amended law was enacted and became effective long after the filing of the charges herein and long after counsel was appointed. Two years after the James decision this court upheld the constitutionality of the Oregon recoupment statute in Fuller v. Oregon, 417. U.S. 40, 40 L. Ed.2d 642, 94 S.Ct. 2116 (1974) which provided that there could be no recoupment unless there was a conviction which stands on appeal. The Oregon statute further prohibits a court from ordering recoupment unless the defendant is or will be able to pay it. Neither case, however, involved an unlawful prosecution but the Fuller case indicates by its strong approval of the tailoring of recoupment to the financial abilities of the defendant and by its approval of the statute prohibiting recoupment in the acquittal situation, that the present Kansas recoupment law surely would be unconstitutional, because it is totally devoid of these protective features.

Essentially the construction the courts have generally placed on the Fuller case is that the right to counsel is not impermissably chilled or burdened if the recoupment obligation is imposed only after it has been determined that the defendant has present ability to pay. People v. Amor, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974); Stroinski v. Office of Public Defender, 134, N.J. Super. 21, 338 A.2d 202 (1975). When the statutes have attempted to impose the obligation to repay without a determination of present ability to pay, such attempts have generally been held to unduly burden the 6th amendment right to counsel. e.g. Commonwealth v. Opara, 362 A.2d 305 (1976); A similar interpretation of the Fuller decision has developed in the cases interpreting the federal recoupment statute. United States v. Bursey, 515 F.2d 1228 (5th Cir. 1975); United States v. Santarpio, 560 F.2d 448 (1st Cir. 1977).

Numerous state court cases hold that it does not chill the exercise of the right to counsel to impose as a condition of probation, the obligation to repay the expenses of the appointed counsel, if, but only if, there is a prior judicial determination that the indigent has the present or foreseeable ability to pay, but when such determination is lacking, the imposition places an unconstitutional burden on the right to counsel. e.g. Commonwealth v. Opara, supra.

In the James case this court expressed considerable sympathy with the plight of a defendant who is acquitted and yet finds himself saddled with a substantial recoupment judgment without the benefit of basic exemptions, 407 U.S. at page 139. Certainly if the defendant is acquitted after an unlawful persecution he should not have to pay anything at all. The state is the liable body. It ran up those expenditures in its attempt to achieve its unlawful purpose. They cannot even charge that to the petitioner.

If the petitioner's attorney had been privately retained, he would have had a civil cause of action for damages for the unlawful prosecution for his attorney fee expenditures against the prosecutor, a duly authorized agent acting within the scope of his authority on behalf of the State of Kansas, if not against the state itself. The Federal Civil Rights Act of 1871, 42 U.S.C. §1983, should surely be applicable here to the extent of cancelling any recoupment rights the state might have had, for to permit recoupment in this situation would be tantamount to approval of a breach of the Federal Civil Rights Act. This can be seen from the fact that the execution of the policies, customs and practices in Kansas are such as to inflict injury in these types of situ-

ations generally. Monell v. Dept. of Social Services, 46 Law Week 4569 (1978). The state provides no review or supervision of the actions of local prosecutors. There is no statute placing even on the attorney general's office any screening function. No precautions or safeguards exist to avoid unlawful prosecutions. Criminal complaints do not require the prior approval of the County Attorney, and K.S.A. §22-2301 implies that it is the right of any citizen to file a complaint alleging the commission of a crime. See Kansas Judicial Council Bulletin, October, 1969, page 24; Richard H. Seaton, Assistant Attorney General, and Paul E. Wilson, Professor of Law, the University of Kansas School of Law, Notes on the Code of Criminal Procedure, 39 .B.A.K. 97, at page 98 (1970). K.S.A. §19-703 imposes on the County Attorney the apparent duty to prosecute such unscreened complaints. Even the governor's administrator of the agreement in effect authorized the second rendition by his signature of the Evidence of Agent's Authority to Act for Kansas (Appendix A) without which the unlawful rendition could not have been carried out, all this despite the statutory bar and the prohibition expressed in the governor's extradition manual which he surely had knowledge of. Nor did the judicial ad-administrator, having charge of the aid to indigent defendants fund, attempt to perform any screening function despite the letter to them of February 11, 1976, explaining the statutory bar to prosecution. Thus Kansas procedures are such as to give tacit permission, if not actual permission, to the maintenance of unlawful prosecutions by making not even the slightest attempt to inquire into or review the prosecutor's cases at any time or under any circumstances.

III. The Court should review this case to consider the question whether the state can enter a civil judgment against a criminal defendant for defense expenditures without a hearing.

Throughout the course of its history this Court has held that notice and a reasonable opportunity to defend are necessary ingredients of procedural due process, in the absence of which a valid personal judgment liability cannot exist. The court below has held that implict in the "notice of the existence of the debt," which gave petitioner 60 days to pay the debt, "is the right to object to the judicial administrator concerning the amount of the expenditure." If such is the case then why do not the notices (Appendix D, E, and J) set this forth? Obviously the intent of the notice was not to apprise the petitioner of a right to object because the statute permits none. It is a mere demand for payment to which is attached a clear cut warning that if not complied with, judgment will automatically be entered. The notice says nothing about a hearing on the issue of liability, nor does it inform petitioner that he has the right to object to the amount or to liability. Nothing is said about raising defenses to the claim, nothing about to whom they are to be addressed, nothing about the required procedure, nothing about a deadline within which they are to be presented or before what body a hearing may be obtained and no hearing date is given. It is a simple demand for payment of an amount which the state has assumed the petitioner to be liable for.

Nor is the court below correct in its analysis of local Kansas law. The court states that "the right to a hearing is present when the state attempts to collect the judgment by execution or

garnishment." While it is true that enforcement type defenses such as prior payment in full, discharge in bankruptcy, or assertion of statutory exemptions, could be raised to dissolve a seizure order or an actual seizure, no prior notice of a seizure is required and there is no procedure allowing for a general challenge to the validity of a judgment at time of enforcement. That must be done within certain time periods and in a particular manner by collateral attack under K.S.A. §60-259(f) and K.S.A. §60-260(b), on the initiative of the person wishing to question the validity of the judgment, and in the meantime, property and wages at all times remain subject to seizure, even during the pendency of the collateral attack, since the statute provides that the filing of such motion does not suspend the operation of the judgment. Thus the collateral attack procedures are in no way correlated with the enforcement process.

Even if the right to a hearing did exist at time of later attempted enforcement, fundamental due process procedural safeguards would still be violated because under this court's decisions in Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969); Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972) and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), even temporary seizures of property without a hearing before a judicial officer are invalid. In this case the judicial administrator, simply by following the conclusory terminology of the statutory language, caused the personal judgments to be entered. He did this as a simple ministerial act and not as a judicial officer, exercising no discretion whatever in the matter, because the recoupment statute permits none. If a temporary seizure of property in pending civil

proceedings, without intervention of a judicial officer, is a violation of fundamental principles of due process, then certainly the entry of a judgment without suit, without process, and without participation by a judicial officer, authorizing subsequent garnishment or execution, likewise violates fundamental rights, and even more so because it authorizes the permanent seizure of property and wages without a hearing.

Nor did this court in the Fuller case approve the method of entering judgment employed here. Under the Oregon statute the court may order the recoupment only if it finds that the defendant is or will become able to pay it. The defendant is before the court, hearings are provided for and are presided over by a judicial officer. This Court furthermore observed that the statute involved in the Fuller case provided for a hearing before execution could be levied. 417 U.S. at 50, note 11. Kansas law has no provision for a hearing before levy of execution.

This Court has repeatedly held that a statute violates due process when it erects a permanent irrebuttable presumption, if it assumes a fact to be universally true when such assumption is not necessarily so or, if there is a reasonable alternative means of decision making. Stanley v. Illinois, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972); Vlandis v. Kline, 412 U.S. 441, 37 L.Ed. 2d 63, 93 S.Ct. 2230 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508, 37 L. Ed.2d 767, 93 S.Ct. 2832 (1973); Cleveland Board of Education v. La Fleur, 414 U.S. 632, 39 L.Ed. 2d 52, 94 S.Ct. 791 (1974). K.S.A. §22-4513 attempts to erect just such a presumption and the court below applies it to create a judgment liability against the defendant and in favor of the state for expenditures that the state caused by

its own unlawful act.

The statute further deprives the petitioner of the equal protection of the laws. Others are granted a hearing before civil judgments are entered and are permitted to make defenses, but petitioner is not. Others are permitted to assert counterclaims or setoffs in civil actions but petitioner is not, although he has a valid claim for cancellation of the recoupment under the federal civil rights act. Others can appeal judgments entered against them, but a recoupment judgment is not appealable because it is not an act, order, or judgment of a court. K.S.A. §60-2101.

As argued to the court below, the federal civil rights act is enforceable in state courts. See annotations to 42 U.S.C.A. §1983 notes 742-744. Thus, this act could have been asserted to cancel the recoupment if a hearing had been provided for.

IV. The Court should review this case to resolve conflicts between federal circuits on the question of whether due process requires a hearing before entry of a recoupment order.

The court below cites United States v. Durka, 490 F.2d 478 (7th Cir. 1973) for the proposition that no hearing is required before entry of a recoupment judgment. This case is distinguishable on several grounds. First, it is an acquittal situation and not an outright unlawful prosecution from the beginning. Second, under the federal statute the recoupment is in the discretion of the court. Thirdly, the order in Durka was enforceable by contempt, which requires a hearing but was not enforceable by execution or garnishment because it did not have the force of a civil judgment. In Kansas, however, civil judgments are enforceable by execution or garnishment,

neither of which requires a prior hearing.

The court in United States v. Santarpio, 560 F.2d 488 (1st Cir. 1977) reasons that the recoupment, attached as a condition of probation, would be constitutional only if not enforced in conflict with the defendant's 6th amendment rights and his abilities to pay in conformity with the standards set forth in Fuller v. Oregon, supra. In United States v. Bursey, 515 F.2d 1228 (5th Cir. 1975) the Court reversed the trial court's summary recoupment against an appearance bond deposit account. The court at page 1238 said:

> In so proceeding we think the district court failed to make "Appropriate inquiry" as to the availability of the funds for payment as required under subsection (f) [18 U.S.C. §3006A (f)]
>
> . . .
>
> At the very least, such an inquiry should have involved notice to Brett Bursey [the defendant] of the anticipated disbursment and an opportunity for him and his sponsors (upon a prompt motion to intervene, cf. [citing case]) to present their objections thereto.

In the Santarpio case (1st Circuit) the defendant either had a hearing at the time of granting of the probation, including also consideration of the issue of whether "funds are available for payment" and whether the recoupment would be "as the interests of justice may dictate" under 18 U.S.C. §3006A (c) & (f), or he accepted the probation with such conditions attached. Nevertheless, the court held that enforcement thereafter had to be in conformity with the standards of Fuller v. Oregon, supra. The Bursey case (7th Circuit) makes it clear that the court must make an "apropriate inquiry" concerning the availability of

funds, with notice to the defendant and an opportunity to object. But the Durka case (7th Circuit) holds that there is no right to a hearing before entry of the recoupment order despite the statutory requirement of a finding that "funds are available for payment" and that the recoupment be "as the interests of justice may dictate." Nor does the court so much as suggest that the standards of Fuller v. Oregon must govern enforcement. Thus the 7th circuit decision and the holding of the court below appear to be in direct conflict with the 1st and 5th circuit holdings. Furthermore, this decision and the Durka decision appear to be inconsistent with a number of state court decisions interpreting the requirements of the Fuller case, e.g. People v. Amor, supra; Stroinsky v. Office of Public Defender, supra; Commonwealth v. Opara, supra.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The venture the state embarked upon here is precisely analogous to the state causing indigent medicaid clients to participate unknowingly in an experimental drug testing program, knowing that the drug will cause them to need medical attention, and then demanding that a doctor provide that service without compensation or wholly inadequate partial compensation and then, in addition, charging those treatment expenditures to the patient as a judgment without even affording a hearing. Has the state discharged its obligation to provide medical service to those persons? No sane individual would argue that it had.

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari be granted.

Dated this 29th day of June, 1978.

Respectfully submitted,

L. H. Goossen

L. H. Goossen
224 East 7th, P.O. Box 725
Newton, Kansas 67114
(316) 283-3628
Attorney for Petitioner

APPENDIX A

EVIDENCE OF AGENT'S AUTHORITY TO ACT FOR KANSAS

TO: Jim Marquez, Administrator of the Agreement on Detainers for Kansas

James L. Keener is confined in U.S. Penitentiary, McNeil Island, Washington 89388, and will be taken into custody at the institution on 1-19-76 for return to this jurisdiction for trial on or about 2-3-76. In accordance with Article V(b), I have designated Sheriff Galen E. Morford or Deputy Bruce Mellor whose signature appears below as agent to return the prisoner.

/s/ Richard C. Morgan, Jr.
Prosecuting Official

/s/ Galen E. Morford
Agent's signature
/s/ Bruce B. Mellor

TO: W. H. Rauch, Warden, U.S. Pentientiary, McNeil Island, Washington 89388.

In accordance with the above representation

and the provisions of the Agreement on Detainers, Sheriff Galen E. Morford or Deputy Bruce B. Mellor is hereby designated as agent for Kansas to return James L. Keener, 39077-115 for trial in Kansas.

/s/ Jim Marquez
Administrator

Certification is hereby given that the person whose signature appears above as Administrator is the duly appointed and acting Administrator of and Central Information Agent for the Agreement on Detainers for Kansas.

(seal)

/s/ Elwill M. Shanahan
Secretary of State
/s/ Lavina M. McDonald
Assistant Secretary of State

APPENDIX B

IN THE DISTRICT COURT OF HARVEY COUNTY, KANSAS

STATE OF KANSAS, Plaintiff,	)	
vs.	)	No. 3166
JAMES L. KEENER, Defendant.	)	

JOURNAL ENTRY

Now on this 25th day of March 1976, this matter comes on for hearing on the defendant's motion for dismissal of all charges of the information herein with prejudice under the provisions of the Agreement on Detainers Act K.S.A. 22-4401 and Title 18 U.S.C.A (Appendix in Supplement). The State of Kansas appears by Richard C. Morgan, Jr.,

County Attorney of Harvey County, Kansas. The defendant appears in person, in the custody of the Sheriff of Harvey County, Kansas, and by his court appointed attorney, L. H. Goossen, of Newton, Kansas. Thereupon the parties announce that they are ready to proceed.

THEREUPON, the defendant presents his evidence and rests.

THEREUPON, the State presents no evidence.

THEREUPON, arguments of counsel were heard.

THEREUPON, the Court takes the matter under advisement and notes that the defendant has already filed a brief and allows the State 10 days within which to submit its brief and the defendant 10 days after the submission of the State's brief to file a reply brief.

Now on this 1st day of September, 1976, this matter comes on for announcement of the decision of the Court on the motion heard herein on the 25th day of March, 1976. The State of Kansas appears by Richard C. Morgan, Jr., County Attorney of Harvey County, Kansas. The defendant appears in person in the custody of the Sheriff of Harvey County, Kansas, and by his attorney, L. H. Goossen, of Newton, Kansas.

THEREUPON the Court makes the following findings of fact:

1. That the charges in this case were filed in the County Court of Harvey County, Kansas, in case No. S-7871, on September 20, 1974.

2. That on April 7, 1975, the defendant pleaded guilty to Federal bank robbery and kidnapping charges in the Federal District Court for the District of Kansas in case No. 74-133-CR6 and was sentenced to a Federal prison term and was thereafter sent to the Federal Pentientiary, McNeil Island, Steilacoom, Washington.

3. Thereafter both Harvey County and Sedgwick County Attorneys' offices requested Temporary Custody under K.S.A. §22-4401 Art. IV(a) and (b) and 18 U.S.C.A., Interstate Agreement on Detainers, Appendix, for purposes of prosecution of charges then pending in the courts of Harvey and Sedgwick counties, and Harvey County accepted temporary custody of the defendant.

4. The defendant arrived in Kansas from the McNeil Island Federal Penitentiary on September 20, 1975, pursuant to said rendition procedures.

5. The defendant was taken before the County Court of Harvey County, Kansas, on September 22, 1975, and L. H. Goossen, Attorney, was appointed to represent him after which time he was taken to Sedgwick County, Kansas.

6. The defendant pleaded guilty to the charges in Sedgwick County, Kansas, on November 10, 1975, in case No. CR-11686.

7. The defendant was thereafter on December 9, 1975, returned by the State of Kansas to the Federal Penitentiary at McNeil Island, Washington.

8. The defendant was thereafter on January 20, 1976, transported from the McNeil Island Federal Penitentiary to Newton, Harvey County, Kansas, by the Harvey County Sherrif's officers without new rendition procedures.

THEREUPON the Court makes the following conclusions of law:

1. That there were no hearing or trial errors in the District Court of Sedgwick County, Kansas, in Case No. CR-11686.

2. That the defendant's return to Federal custody on December 9, 1975, was harmless error.

3. That the Court has discretion as to whether

to dismiss the information.

4. That the information herein is not dismissed with predjudice as a matter of law under the facts of the present case.

5. That all delays in prosecution were caused by the defendant.

IT IS THEREFORE ORDERED that the defendant's motion to dismiss all charges contained in the information filed herein, be and it hereby is, overruled and denied.

/s/ Sam H. Sturm
Sam H. Sturm, District Judge
District Court of Harvey
County, Kansas

APPROVED:

/s/ Richard C. Morgan, Jr.
Richard C. Morgan, Jr.,
County Attorney

/s/ L. H. Goossen
L. H. Goossen
Attorney for Defendant

APPENDIX C

IN THE DISTRICT COURT OF HARVEY COUNTY, KANSAS

STATE OF KANSAS	Plaintiff	
VS.		Case No. 3166
JAMES L. KEENER	Defendant	

JOURNAL ENTRY OF JUDGMENT

NOW ON THIS 7th day of December, 1976, this

matter comes on for trial by jury. The State of Kansas appears by Richard C. Morgan, Jr., County Attorney of Harvey County, Kansas. The defendant appears in person, in the custody of the Sheriff of Harvey County, Kansas, and by his Court-appointed attorney, L. H. Goossen, of Newton, Kansas. Thereupon, the parties announce that they are ready to proceed.

THEREUPON, the State moves the Court for an order dismissing Counts III, IV, and IX, and the Court, upon hearing statements of counsel, so ORDERS.

THEREUPON, the defendant moves the Court for an order preventing any jurors being seated that bank at the State Bank of Burrton or live in or around Burrton or Halstead, and the Court, upon hearing statements and arguments of counsel, does find that defendant's motion should be and is hereby overruled and denied.

THEREUPON, a jury of twelve (12) is selected to hear the trial hereon, the members of said jury being as follows:

Marsha Ring, Michael Dain, Kale F. Kiefer, Kathleen Kunish, Earl Jackson, Reuben Koehn, Jr., Ronald Troyer, Steven Holinde, Mary Barrier, Dick Springer, Ruth V. David, Russell F. LaGree.

The Court then recesses.

THEREUPON, the Court reconvenes. The Court notes that all the jury are present, that the parties are present and ready to proceed, and the State makes its opening statement.

THEREUPON, the State presents its evidence. The defendant objects to the introduction of State's exhibits 10 and 15 through 21, and 23, and the State then withdraws its offer of said ex-

exhibits. The State then rests.

THEREUPON, the defendant presents his evidence and rests. The Court then recesses until 9:00 A. M. on December 8, 1976, after admonishing the jury not to discuss this action among themselves or with others.

NOW ON THIS 8th day of December, 1976, the Court reconvenes. The State of Kansas appears by Richard C. Morgan, Jr., County Attorney. The defendant appears in person, in the custody of the Sheriff of Harvey County, and with his Court-appointed attorney, L. H. Goossen.

THEREUPON, the Court instructs the jury as to the law of this case. Thereupon, final argument is presented by the parties. Thereupon, the baliff is sworn and the jury retires to the jury room for deliberations.

THEREUPON, at 11:45 A.M. the jury returns and announces that is has reached a verdict, which verdict is guilty as charged on all counts.

THEREUPON, the Court inquires of counsel if a poll is desired and upon receiving a negative reply, accepts the verdict and discharges the jury from further duty in this case.

IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED:

ONE: That the defendant is guilty as charged in Count I of aggravated burglary in violation of K.S.A. 1973 Supp. 21-3716.

TWO: That the defendant is guilty as charged in Count II of aggravated assault in violation of K.S.A. 1973 Supp. 21-3410(a).

THREE: That the defendant is guilty as charged in Count V of aggravated robbery in violation of K.S.A. 1973 Supp. 21-3427.

FOUR: That the defendant is guilty as charged in Count VI of burglary in violation of K.S.A. 1973 Supp. 21-3715.

FIVE: That the defendant is guilty as charged in Count VII of attempted murder in violation of K.S.A. 1973 Supp. 21-3301.

SIX: That the defendant is guilty as charged in Count VIII of attempted murder in violation of K.S.A. 1973 Supp. 21-3301.

SEVEN: That the defendant is guilty as charged in Count X of attempted murder in violation of K.S.A. 1973 Supp. 21-3301.

EIGHT: That the defendant has ten (10) days in which to file post-trial motions.

NINE: That hearing shall be had on December 22, 1976, at 9:00 A.M. on all motions or such other matters as may properly come before the Court.

NOW ON THIS 22nd day of Decebmer, 1976, this matter comes on for hearing on defendant's Motion to Arrest Judgement. The State of Kansas apapears by Richard C. Morgan, Jr., County Attorney. The defendant appears in person, in the custody of the Sheriff of Harvey County, and with his Court-appointed attorney, L. H. Goossen, of Newton, Kansas.

THEREUPON, the defendant requests a continuance and the Court, upon hearing arguments and statements of counsel, ORDERS this matter continued to January 4, 1977, at 10:30 A.M.

NOW ON THIS 4th day of January, 1977, this matter comes on for hearing on defendant's Motion to Arrest Judgment. The State of Kansas appears by Richard C. Morgan, Jr., County Attorney. The defendant appears in person, in the custody of the Sheriff, and with his Court-appointed attorney, L.

H. Goossen.

THEREUPON, the defendant presents evidence in support of said motion and rests. The State presents no evidence.

THEREUPON, the parties present their arguments.

THEREUPON, the Court, having heard the arguments and statements of counsel, does find that defendant's motion should be and is hereby overruled and denied for all reasons previously stated in rulings on September 1, 1976, and the Court does hereby find that all of said findings of fact and conclusions of law made in connection with the previous Motion to Dismiss the Information are applicable.

THEREUPON, the defendant objects to being sentenced on the grounds that the case has been dismissed by operation of law, and the Court, having heard the arguments and statements of counsel, does find that defendant's objection should be and is hereby overruled and denied. The Court further finds that a pre-sentencing report is not required.

THEREUPON, the defendant is sentenced as follows:

ONE: Under Count I, the defendant is sentenced pursuant to K.S.A. 1973 Supp. 21-4501 (c) to confinement for a term, the minimum of which is five (5) years and the maximum of which is twenty (20) years.

TWO: Under Count II, the defendant is sentenced pursuant to K.S.A. 1972 Supp. 21-4501 (d) to confinement for a term, the minimum of which is three (3) years and the maximum of which is ten (10) years.

THREE: Under Count V, the defendant is sentenced pursuant to K.S.A. 1973 Supp. 21-4501 (b)

to confinement for a term, the minimum of which is fifteen (15) years and the maximum of which is life.

FOUR: Under Count VI, the defendant is sentenced pursuant to K.S.A. 1973 Supp. 21-4501 (d) to confinement for a term, the minimum of which is three (3) years and the maximum of which is ten (10) years.

FIVE: Under Count VII, the defendant is sentenced pursusant to K.S.A. 1973 Supp. 21-4501 (c) to confinement for a term, the minimum of which is five (5) years and the maximum of which is twenty (20) years.

SIX: Under Count VIII, the defendant is sentenced pursuant to K.S.A. 1973 Supp. 21-4501 (c) to confinement for a term, the minimum of which is five (5) years and the maximum of which is twenty (20) years.

SEVEN: Under Count X, the defendant is sentenced pursuant to K.S.A. 1973 Supp. 21-4501 (c) to confinement for a term, the minimum of which is five (5) years and the maximum of which is twenty (20) years.

The Court assesses no fine in addition thereto. The sentences are to run consecutively to each other and to the Federal Sentence now being served by the defendant. Pursuant to K.S.A. 21-4614, the defendant shall be given credit for time spent in the Harvey County Jail since September 22, 1975, which credit shall commence at the completion of the Federal sentence. The costs of the action are assessed to the defendant. Pursuant to K.S.A. 21-4609, the defendant is ordered committed to the custody of the Secretary of Corrections for placement and is further committed to the custody of the Sheriff of Harvey County, Kansas, to see that the sentence and judgment of

this Court is carried out. The Court will use the facilities of the Kansas Reception and Diagnostic Center pursuant to K.S.A. 75-5262 for study, examination, evaluation, treatment, recommendations and reports for the rehabilitation of the defendant.

IT IS FURTHER ORDERED that the Secretary of Corrections and the Federal authorities shall decide who shall have immediate custody of the defendant.

THEREUPON, the defendant files an Affidavit Forma Paupris and after hearing arguments and statements of counsel, the Court finds that the defendant is indigent and appoints L. H. Goossen of Newton, Kansas to represent the defendant during appeals.

THEREUPON, the counsel for defendant moves the Court for an order finding that he is entitled to and granting reasonable compensation for his services to the defendant in all proceedings herein, both previously rendered and such as may be rendered on appeals, without regard to payment limits set by the state fund to aid indigent defendants, and the Court, after hearing arguments and statements of counsel, overrules and denies counsel's motion, on the grounds that the Court will be bound by the limitations set by the state fund to aid indigent defendants.

THEREUPON, the defendant files his Affidavit Concerning Exceptional Case and submits his voucher for services rendered to date for approval by the Court, a copy of which is marked Exhibit B, and which is offered in evidence. The State objects to said voucher, and the Court thereupon announces that it will review the matter and consider it again at a later date.

BE IT SO ORDERED.

/s/ Sam H. Sturm
(seal) SAM H. STURM, Judge of the District Court, Harvey County, Kansas

APPROVED:

/s/ Richard C. Morgan
RICHARD C. MORGAN, JR.
County Attorney

/s/ L. H. Goossen
L.H. GOOSSEN
Attorney for Defendant

APPENDIX D

THE SUPREME COURT
OF KANSAS
State House
Topeka, Kansas 66612

James L. Keener
Harvey County Jail
Courthouse
Newton, Kansas 67114

CERTIFIED MAIL

April 6, 1977

Re: Attorney fees in the amount of $3,909.84
Harvey County Case No. 3166
Paid by our Voucher No. 2989 on March 9, 1977

Dear Sir:

Kansas laws provide for the appointment of an attorney, or certain other services as needed, in the defense of a person charged with a felony who is determined to be unable at that time to pay for such services. The same law, however, also provides that we must send such defendant a bill or demand for payment as soon as we pay for those

services.

In compliance with Chapter 169, Sec. 3, Laws of 1976, we therefore advise that the above amount has been paid for your defense in the above case and is now due and owing to the State of Kansas. You are hereby advised to pay this amount to: The Supreme Court, Office of Judicial Administrator, Statehouse, Topeka, Kansas 66612.

Failure to pay this amount by June 10, 1977* shall cause this claim to be entered as a judgment against you in the same manner and to the same extent as any other judgment under the code of civil procedure and shall become a lien on real estate from and after the time of filing thereof. Any amount still unpaid by this date shall bear interest at the rate of six percent (6%) per annum from the date our voucher was paid.

JAMES R. JAMES
Judicial Administrator

*After this date, payment should be made to: Clerk of District Court, Harvey County, Newton, Kansas

APPENDIX E

This letter is identical with Appendix D except that it is addressed to the petitioner, James L. Keener at the Federal Penitentiary, McNeil Island, Washington, is dated May 10, 1977, for Court Reporter's fees of $233.75, paid by voucher No. 3728 on May 5, 1977, and it states that failure to pay said amount by July 22, 1977, will cause the claim to be entered as a judgment.

APPENDIX F

ABSTRACT FOR JUDGMENT
(Indigent Defendant)

KANSAS SUPREME COURT
OFFICE OF JUDICIAL ADMINISTRATOR

THE STATE OF KANSAS, TO CLERK OF THE DISTRICT COURT, Harvey County

GREETINGS:

WHEREAS, pursuant to the provisions of chapter 169, Sec. 3, 1976 Session Laws of Kansas, demand for payment has been made by the Judicial Administrator, State of Kansas, upon

James L. Keener
Harvey County Jail
Courthouse
Newton, Kansas 67114 Case No. 3166

for payment of amounts expended in his defense, and which amount is due and unpaid from

March 9, 1977

AND WHEREAS, the said indigent defendant has failed or refused to pay the same, and there is now due and owing to THE STATE OF KANSAS, for such expenditures from the said indigent defendant, the sum of $3,909.84, plus interest.

NOW THEREFORE, by virtue of the authority vested in the Judicial Administrator by Chapter 169, Sec. 3, 1976 Session Laws of Kansas, you are hereby directed to enter the total amount cited above on your judgment docket and such total amount, together with the interest thereon at the rate of six percent (6%) per annum shall become a judgment from the date of the expenditure until paid, in the same manner and to the same extent as any

other judgment under the code of civil procedure and shall become a lien on real estate from and after the time of filing thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Supreme Court of the State of Kansas to be affixed hereto, this 10th day of June, 1977.

/s/ James R. James
JAMES R. JAMES
Judicial Administrator

APPENDIX G

This abstract for judgment is identical with Appendix F except that it bears the address of the petitioner, James L. Keener at the Federal Penitentiary, McNeil Island, Washington, and is for amounts expended in the defense on May 5, 1977, stated to be $233.75, and is dated July 22, 1977.

APPENDIX H

OPINION OF KANSAS SUPREME COURT

Date of Entry May 6, 1978

224 Kan. 100 (1978)

No. 48,876

STATE OF KANSAS, *Appellee*, v. JAMES L. KEENER, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Agreement on Detainers.* The provisions of the Agreement on Detainers (K.S.A. 22-4401, *et seq.*) are applicable to both the state and federal governments.
2. SAME—*Agreement on Detainers—Dismissal of Charges.* The provisions of Article IV (*e*) of the Agreement on Detainers (K.S.A. 22-4401, *et seq.*) mandate that charges be dismissed against a prisoner whose custody has been surrendered by the federal government to the state government for prosecution when the prisoner is returned to federal custody without being tried on such charges.
3. SAME—*Indigent Defendant—Attorney's Fees.* The state is not liable for attorney's fees for representation of an indigent defendant in a criminal action except as provided in the Aid to Indigent Defendants Act (K.S.A. 22-4501, *et seq.*).
4. SAME—*Indigent Defendant—Attorney's Fees—Constitutionality of Recoupment Statute.* The aid to indigent defendants recoupment statute, K.S.A. 1977 Supp. 22-4513, is constitutional.

Appeal from Harvey district court; SAM H. STURM, judge. Opinion filed May 6, 1978. Reversed in part and affirmed in part.

L. H. Goossen, of Newton, argued the cause and was on the brief for the appellant.

James W. Modrall, county attorney, argued the cause, and *Curt T. Schneider*, attorney general, was with him on the brief for the appellee.

The opinion of the court was delivered by

OWSLEY, J.: This is an appeal from convictions for one count of aggravated burglary (K.S.A. 21-3716), one count of burglary (K.S.A. 21-3715), one count of aggravated robbery (K.S.A. 21-3427), one count of aggravated assault (K.S.A. 21-3410), and three counts of attempted murder (K.S.A. 21-3301 and K.S.A. 21-3401). The issue before this court involves Article IV of the Agreement on Detainers (K.S.A. 22-4401, *et seq.*).

On September 20, 1974, a complaint was filed in Harvey County, Kansas, alleging defendant committed the above crimes. Federal charges arising from the same incident were filed at about the same time and on April 7, 1975, defendant pled guilty to those charges. He was subsequently sentenced to the federal penitentiary for one term of twenty-five years and two fifty-year terms. Defendant was placed in the U. S. Penitentiary at McNeil Island, Washington.

On May 9, 1975, Sedgwick County filed a request for temporary

custody of defendant, pursuant to Article IV of the Agreement on Detainers so it might prosecute him on outstanding charges on another crime. Harvey County filed an identical request on August 6, 1975. Two days later the federal warden offered custody of defendant to the State of Kansas as the Agreement provides. The offer was addressed to Sedgwick County, but listed the charges pending in Harvey County. On August 11, 1975, Harvey County accepted the offer of custody. Defendant arrived in Kansas on September 20, 1975. On September 22, 1975, defendant was arraigned in Harvey County and counsel was appointed. Thereafter defendant was returned to Sedgwick County where he had been jailed upon arriving in Kansas. On November 10, 1975, defendant pled guilty to the Sedgwick County charges. On December 3, 1975, Sedgwick County ordered defendant returned to McNeil Island despite the pending Harvey County charges which were known to Sedgwick County. Defendant was returned on December 9. One week later Harvey County learned of this situation and immediately attempted to regain custody of defendant. On January 16, 1976, defendant filed a motion to dismiss the Harvey County charges, relying on Article IV (*e*) of the Agreement on Detainers. Defendant was returned to Kansas on January 20, 1976, and was later tried and convicted of the charges.

On appeal, defendant argues, *inter alia*, that the charges should have been dismissed because of the state's violation of Article IV of the Agreement on Detainers. We agree. Article IV (*e*) of the Agreement states:

"(*e*) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (*e*) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

The provisions of the act were triggered when the request for temporary custody was filed and the federal authorities gave up custody of defendant. (See, *State v. Clark*, 222 Kan. 65, 68, 563 P.2d 1028 [1977].) Both the state and federal governments are parties to the Agreement (Article II [*a*]) and they are bound by its terms. When the state returned defendant without having tried him on all the outstanding charges pending in this state defendant was entitled to have them dismissed with prejudice.

While the sanction imposed may seem severe, it is mandated by the Agreement. Other jurisdictions faced with similar facts have reached the same conclusion. (See, *United States v. Sorrell*, 562 F.2d 227 [3d Cir. 1977]; *United States v. Thompson*, 562 F.2d 232 [3d Cir. 1977]; *United States v. Cyphers*, 556 F.2d 630 [2d Cir. 1977], cert. denied ___ U.S. ___, 53 L.Ed.2d 1070, 97 S.Ct. 2937; *United States v. Mauro*, 544 F.2d 588 [2d Cir. 1976]; *United States ex rel. Esola v. Groomes*, 520 F.2d 830 [3d Cir. 1975]; *Commonwealth v. Merlo*, 242 Pa. Super. 517, 364 A.2d 391 [1976].) The charges must be dismissed.

Defendant also raises two issues concerning the award of attorney's fees pursuant to the aid to indigent defendants fund. (See, K.S.A. 22-4501, *et seq.*) The first issue concerns the adequacy of the award of attorney's fees made by the state board of supervisors of panels to aid indigent defendants. After the conclusion of the criminal case, defense counsel submitted a claim voucher for the time and expense involved in the defense of the case. The board reduced the claim and made an award. A subsequent attempt by defense counsel to obtain an additional award was denied.

The thrust of defendant's argument is that he has a constitutional right to have his defense counsel adequately compensated, particularly in a case where the prosecution was "unlawful." We find no support for the argument.

It is the moral and ethical obligation of the bar to make representation available to the public. (See, Canon 2, Code of Professional Responsibility, 220 Kan. cx.) Quite often, fulfillment of that obligation involves the representation of a client, particularly a criminal defendant, for little or no remuneration. Enactment of K.S.A. 22-4501, *et seq.*, has served to relieve some of the hardships involved in fulfilling an attorney's obligation to provide legal representation to the public; but it has not cancelled the attorney's ethical responsibility to provide representation without compensation if necessary. Court appointed counsel has no constitutional right to be compensated, much less to receive full and adequate compensation which may have been received if the same time had been spent on a fee-paying client's problems. (See, *United States, v. Dillon*, 346 F.2d 633 [9th Cir. 1965].)

Claims for fees submitted to the board of supervisors of panels to aid indigent defendants are considered by the board according

to the criteria set forth in the statutes and rules of this court. The decision of the board as to the amount of compensation to be awarded in any case is final. (Rule 404, Claims Under Indigent Criminal Defendants Act, 220 Kan. cviii.)

Finally, defendant challenges the constitutionality of the aid to indigent defendants recoupment statute, K.S.A. 1977 Supp. 22-4513. Under the terms of the statute a defendant is liable to the State of Kansas for any expenditure paid from the aid to indigent defendants fund. The statute provides that the expenditures shall be recovered from the defendant by sending to him by certified mail a notice of liability, stating the amount of the expenditure and a demand for repayment. The notice further states that the sum must be repaid within sixty days after receipt of the notice or the expenditure shall become a judgment bearing six per cent annual interest after it is docketed on the judgment docket in the county where the criminal case was tried. This judgment becomes a lien on real estate the same as any other civil judgment and is subject to satisfaction by execution or garnishment to the same extent as an ordinary civil judgment.

Defendant argues the statute is unconstitutional because it does not provide for notice and a hearing, violating the due process clause. In support of his argument he cites *Hillhouse v. City of Kansas City*, 221 Kan. 369, 559 P.2d 1148 (1977); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), reh. denied 409 U.S. 902, 34 L.Ed.2d 165, 93 S.Ct. 177; and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969).

We find no constitutional infirmity in the recoupment statute. A defendant receives notice of the existence of the debt for legal services by certified mail at his last known address prior to the time the sum is made a judgment of record. He is given sixty days to pay the debt. Implicit in that sixty-day delay is the right to object to the judicial administrator concerning the amount of the expenditure. Even after the sum becomes a judgment the right to a hearing is present when the state attempts to collect the judgment by execution or garnishment. In either situation, the debtor has the right to be heard and, if he wishes, to contest the validity of the judgment. The right to contest a judgment at a collection

proceeding satisfies due process requirements. (See, *United States v. Durka*, 490 F.2d 478 [7th Cir. 1973]; *Stroinski v. Office of Public Defender*, 134 N.J. Super. 21, 338 A.2d 202 [1975]. See also, *People v. Amor*, 12 Cal. 3d 20, 114 Cal. Rptr. 765, 523 P.2d 1173 [1974].)

The judgment as to the conviction on the criminal charges is reversed and the trial court is instructed to discharge the defendant. The judgment as to attorney fees is affirmed.

McFARLAND, J., dissents from Syl. 2 and corresponding parts of the opinion.

APPENDIX I

LIMITED APPROVAL OF CLAIM OF COUNSEL FOR INDIGENT

To: Judicial Administrator

Re: State vs. Keener

Case No. 48876

Considering the limited funds available in the aid to indigent defendants' fund, together with the nature and difficulty of the issues involved in the appeal and the time reasonably necessary to prepare and present the same, a limited fee plus reimbursable expense in the total sum of $2,801.37 is approved for payment.

Dated in conference 4-10-1978.

/s/ Robert H. Miller
Departmental Justice

Robert H. Miller, Justice of
the Kansas Supreme Court

APPENDIX J

This letter is identical with Appendix D except that it is addressed to the petitioner James L. Keener #39077, at McNeil Island Federal Penitentiary, P. O. Box 1000, Steilacoom, Washington 98388, is dated May 24, 1978, for attorney's fees of $2,801.37, in case No. 48876 and 3166 paid by voucher No. 3858 on 4-19-78, and it states that failure to pay said amount by July 28, 1978, will cause the claim to be entered as a judgment.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-54

JAMES L. KEENER, *Petitioner*

vs.

STATE OF KANSAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF KANSAS

SUPPLEMENTAL BRIEF FOR PETITIONER CALLING ATTENTION TO INTERVENING MATTERS

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF KANSAS

SUPPLEMENTAL BRIEF FOR PETITIONER

CALLING ATTENTION TO INTERVENING MATTERS

On September 5, 1978, the Judicial Administrator, who is the Indigent Fund administrative and disbursing agent acting for the State of Kansas, entered another judgment without a hearing, on behalf of and in favor of the State of Kansas, for the state's expenditures for the services of court appointed counsel on appeal, this time for $2,801.37. The judgment is similar in form to Appendix F attached to the Petition for Writ of Certiorari. This judgment, like the previous judgments, was based on expenditures which would never have been incurred had it not been for the unlawful prosecution in violation of Articles IV (e) and V(c) of the Interstate Agreement on De-

tainers, 18 U.S.C., App. Interstate Agreement on Detainers (1970) and the Federal Civil Rights Act, 42 U.S.C. §1983. The entry of this judgment is clear independent state action ratifying the unlawful prosecution because it was entered by the Judicial Administrator, an employee of the Kansas Supreme Court, almost four months after the Kansas Supreme Court holding that the prosecution had been barred and almost two months after the Petition for Certiorari was filed and served upon the Kansas Supreme Court as shown by the files and records of this Court, all this without waiting for any action or rulings from this honorable Court.

Thus, despite the fact that the Judicial Administrator knew of the decision of the Court below, which amounted to a finding that the prosecution was unlawful, and despite notice that the issue was being raised before this Court, he took affirmative action to enter a judgment against the petitioner, putting the State of Kansas in a position to avail itself of the benefits thereof even though the expenditures represented by the judgment were caused solely by the unlawful prosecution. The point is that, even though the Judicial Admistrator knew of the lower court finding dismissing the unlawful prosecution, he entered judgment anyway on a claim that existed solely because of that unlawful prosecution and even while a Petition for Writ of Certiorari was on file in this Court. Any state attempt to avail itself of any benefit from an unlawful act of any of its agents or any attempt to recover for something caused by the act, from a victim of that act, is a ratification. Thus, the highest judicial administrative official of the State of Kansas, acting on behalf of the state, has ratified the prosecution. In Olmstead v. United States, 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 (1928) at page

483, Mr. Justice Brandeis in his dissent set forth the essence of ratification as follows:

> When the government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officer's crimes. [citing cases] And if this court should permit the government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification.

This statement applies here, notwithstanding its reference to "officers' crimes", for in the last analysis, federal constitutional and statutory rights cannot be made to depend on local state designations of what conduct should or should not be made subject to criminal sanctions. The important factor is that the prosecution here was conducted in the face of a statutory bar, contrary to both state and federal law.

This Court has never ruled on the question of what constitutional consequences flow from maintaining an unlawful prosecution. Petitioner's position is that an unlawful prosecution must stop dead in its tracks. Anything less must surely be a due process violation if a clear unlawfulness is present and is promptly called to the attention of the prosecutor and the Court, as was done in this case. Otherwise the prosecution receives a license to try to coax and cajole the defense into waiving defects or maneuvering the defense into "catch 22" situations. The danger of incurring a waiver in the course of a criminal defense is great, and state trial and appellate Courts are prone to search them out as justifications for up-

holding convictions. Due process surely does not permit the Court to allow the prosecution to promote defense mistakes in an unlawful prosecution or take advantage of the occurrence of some future inadvertant waiver for later use to justify affirmance of the conviction. These situations always present serious due process questions but those questions can seldom be raised because if the case is reversed, it will be on other grounds leaving the due process argument moot, and if affirmed it will be predicated on waiver, in which case the defendant generally finds himself in no position to assert it as a practical matter. Mr. Justice Holmes, at page 470 in his dissent in Olmstead v. United States, supra, reasoned that "... no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such inequities to succeed."

Just as this Court acted affirmatively in Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S. Ct. 1684 (1961) to end illegal searches by making them unprofitable, so this Court should now act to make unlawful prosecutions unprofitable because they are not only a violation of a defendant's rights, they are a misuse of the judicial system.

This case is a glaring example of how some Courts have felt at liberty to ignore the standards of Fuller v. Oregon, 417 U.S. 40, 40 L.Ed 2d 642, 94 S.Ct. 2116 (1974) even in extreme situations. There is rather surprising justification for this position because this Court in Fuller, in affirming, simply approved that particular Oregon recoupment law, but it did not state the negative of what such statutes cannot provide, nor did it state that the provisions of that statute ex-

pressed minimum constitutional standards. The Court below therefore ignores that case completely, in effect taking the position that it does not express standards by which the validity of recoupment laws are to be measured. Other more enlightened decisions hold that Fuller did establish recoupment standards. United States v. Santarpio, 560 F.2d 448 (1st Cir. 1977); People v. Amor, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974); Stroinski v. Office of Public Defender, 134 N.J. Super. 21, 338 A.2d 202 (1975); Commonwealth v. Opara, 362 A.2d 305 (1976). Even by this view, the standards in any given case are of uncertain applicability deductible from the Fuller case only by negative inference. Thus, while the Fuller case has had an influence on some courts, it has been ineffective in curbing abusive recoupment attempts, as this case illustrates.

The prevailing view in Kansas is that the legislative elimination of the discriminatory denial of exemptions (Kansas Session Laws, 1976, ch. 169, §3) eliminates all constitutional defects even though this Court in James v. Strange, 407 U. S. 128, 32 L.Ed.2d 600, 92 S.Ct. 2027 (1972) affirmed the three judge district court decision of Strange v. James, 323 F.Supp. 123 (Dist. Ct. Kans., 1971) which struck down the Kansas recoupment law, however, on other constitutional grounds. This Court specifically stated that it did not reach the constitutional question on which the lower Court decided the case. The amended recoupment law left intact all of the provisions that the three judge district court found objectionable, none of the standards of the Fuller case are met, and the Court below feels totally at liberty to disregard the Fuller case.

This situation has given rise to at least four other cases challenging the validity of the amended Kansas recoupment law which are now pend-

ing in various stages in Kansas trial and appellate courts, one of which is a federal class action. A decision in this case will resolve this litigation. Recoupment laws of various types are in effect in approximately 17 states and there is a federal recoupment law. A decision in this case will clarify whether those laws must be enforced in accordance with Fuller standards, whether notice and a hearing are necessary before entering a recoupment order, and whether a state can recoup despite estopple and violation of civil rights defenses.

This Court will face the above important unresolved issues and in addition, the Court for the first time will face the issue of whether there are any limits to denial of fees to counsel on appointive cases when the prosecution is unlawful. Furthermore, this Court will face the issue of whether a law that permits the state to profit from its own wrong from an unwilling participant or victim, is in violation of the due process clause. It is difficult to imagine a case that would bring all of these important issues into clearer focus.

This Court should review not only the opinion of the Kansas Supreme Court, but all questions within the scope of petitioner's statement of questions presented for review as set forth in the Petition for Writ of Certiorari and fairly presented by the record. The Court should specifically include in its review the most recent Judicial Administrator's judgment and also the previous judgments, all entered without hearings and none being subject to appeal because they are not judgments of a court. K.S.A. 60-2101. Furthermore, the Court below reviewed the constitutional issues raised by these judgments and held that the judgments were valid. This Court should also review the fee request denials since the Court below decided that such denials are final and not subject to judicial

review.

For the foregoing reasons, as well as those urged in the Petition, certiorari should be granted.

Dated this 3rd day of October, 1978.

Respectfully submitted,

Levi H. Goossen

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(316) 283-3628
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-54

JAMES L. KEENER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

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JAMES L. KEENER,
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STATE OF KANSAS,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

COMES NOW, the Respondent by and through their counsel, Assistant Attorney General for the State of Kansas, Roger N. Walter, and for their response to the submitted Petition for a Writ of Certiorari present the following brief in opposition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those statutes cited by the petitioner, respondent submits these additional statutory provisions for the Court's consideration.

Kansas Statutes Annotated, Section 22-4507
(Supp. 1977)

"Same; entitlement to compensation and reimbursement of expenses for services to indigents; standards; claims, approval; filing with administrator; payment; proration of payments, when; rules. An attorney who performs services for an indigent person, as provided by this act, shall at the conclusion of such service or any part thereof be entitled to compensation for his or her services and to be reimbursed for expenses reasonably incurred by such person in performing such services. Compensation for services shall be paid in accordance with standards of panels to aid indigent defendants. *Claims for compensation and reimbursement shall be certified by the claimant and approved by the judge of the district court before whom the service was performed,* or, in the case of proceedings in the court of appeals, by the chief judge of the court of appeals and in the case of proceedings in the supreme court, by the departmental justice for the department in which the appeal originated. *Each claim shall be supported by a written statement, specifying in detail the time expended, the services rendered, the expenses incurred in connection with the case and any other compensation or reimbursement received.* When properly certified and approved, such claims for compensation and reimbursement shall be filed in the office of the judicial administrator of the courts who shall authorize payment from the aid to indigent defendants fund.

Should it appear to the board of supervisors that the balance in such fund together with anticipated revenues will be insufficient in any fiscal year to pay in full claims filed and reasonably anticipated to be

filed in such year, the board is authorized to adopt a formula for prorating the payment of pending and anticipated claims so as to ensure an equitable allocation of the available balance among those persons having or filing valid claims against the fund.

The supreme court may adopt rules governing the filing, processing and payment of such claims." [Emphasis supplied.]

Rules of the Kansas Supreme Court
220 Kan. cviii

Rule 403

APPROVAL OF CLAIM:—DETERMINING REASONABLENESS—REQUEST FOR REVIEW. (a) Claims for services performed at the magistrate or county court level in cases terminating in such courts shall bear the approval of the magistrate or county judge.

(b) Claims for services performed in one case at both the magistrate or county court level and at the district court level shall be approved by the district judge.

(c) Claims for services performed in appealing a case to the Supreme Court shall be approved by the departmental justice for the department in which the appeal originated.

(d) In approving said claims the magistrate, judge or justice shall examine the same and determine the reasonableness thereof, giving effect to any standards established by the Board of Supervisors of Panels. In determining the reasonableness of said claims the magistrate, judge or justice shall consider the nature and difficulty of the issues involved in the case and the

time reasonably necessary to prepare and present the same. The magistrate, judge or justice, in the exercise of his discretion, may reduce the amount of any claim submitted to him before approving the same.

(e) When any claim is adjusted and approved in part only by the magistrate, county judge or district judge the claim as approved shall be returned to the claimant for filing. Upon filing such claim with the judicial administrator the claimant may request a review of the claim by the Board of Supervisors of Panels as provided in Rule No. 404.

Rule 404

CLAIMS—REVIEW BY BOARD OF SUPERVISORS OF PANELS. The judicial administrator on his own initiative may and at the request of any claimant he shall withhold payment of any claim filed for services performed on the magistrate, county and district court level until such claim is reviewed by the Board of Supervisors of Panels. Upon review the Board of Supervisors of Panels shall determine the amount of claim to be paid, taking into consideration the time and effort reasonably justified by the nature and difficulty of the issues involved in the case and the time reasonably necessary to prepare and present the same, and such decision by the Board shall be final.

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner's statement of the case, insofar as it related objective fact and not biased characterization of those facts, is substantially correct.

Petitioner was confined in a federal penitentiary on a plea of guilty to bank robbery and kidnapping. (R. Vol. II, p. 20, Exhibit E). Two Kansas counties filed identical requests for custody of the petitioner under Article IV of the Interstate Agreement on Detainers. On May 9, 1975, the Sedgwick County Attorney requested temporary custody of the petitioner. (R. Vol. II, pp. 14-15). On August 6, 1975, the Harvey County Attorney likewise requested custody for prosecution of related charges. (R. Vol. II, pp. 7-8). On August 8, 1975, the Federal Warden offered temporary custody to Harvey County. (R. Vol. II, pp. 17-18). On August 11, 1975, the Harvey County Attorney accepted the offer of custody. (R. Vol. II, pp. 1-3). The record does not reflect whether Sedgwick County ever accepted custody. (R. Vol. IV, p. 95).

The petitioner arrived in Sedgwick County pursuant to the above arrangements on September 20, 1975. (R. Vol. IV, p. 72). On September 22, 1975, the petitioner was taken to Harvey County, arraigned on pending charges before the District Court, and returned to Sedgwick County. (R. Vol. IV, pp. 17 & 72).

On November 10, 1975, the petitioner plead guilty to all the pending charges in Sedgwick County, and was sentenced. (R. Vol. III, pp. 1-2, Vol. IV, p. 42). On December 3, 1975, on motion of the District Attorney's office of Sedgwick County, the District Court of Sedgwick County entered an order authorizing the return of the petitioner to federal custody. This order was entered without notice to the defendant, or to Harvey County. (R. Vol. II, p. 11). On December 9, 1975, the defendant was transported back to federal custody. (R. Vol. II, p. 13, Vol. IV, p. 73).

Harvey County authorities did not learn of the petitioner's return till after it was effected. These authorities subsequently sought and obtained the petitioner's return

on January 20, 1976. (R. Vol. IV, pp. 34 & 73). Defense counsel in a Motion to Dismiss argued that this prosecution was barred by Article IV (c) & (e) of the Interstate Agreement on Detainers. K.S.A. 22-4401. (R. Vol. V, pp. 40-47). The motion was denied. The petitioner was eventually convicted.

The events subsequent to this are as recounted in the petitioner's statement of the case.

Exception, however, is taken with counsel for the petitioner's subtle insertion of biased characterizations and conclusions throughout the factual account of the case's history of which, to the best of counsel's knowledge, are not supported in the record by sworn testimony or competent evidence. Specifically, respondent objects to the references and innuendoes within pp. 8-9 of the petitioner's brief, that state authorities obtained the petitioner's return in January of 1976 through knowingly implementing defective proceedings and with knowledge that his return was contrary to law.

B. How the Federal Question Arose.

On appeal of his criminal conviction to the Kansas Supreme Court, petitioner contested the validity of his conviction in light of the language of subsection (c) and (e) of Article IV of the Interstate Agreement on Detainers. In addition counsel for the petitioner asserted two issues regarding the state procedures for compensating court-appointed attorneys.

Counsel for petitioner was not reimbursed in the full amount for his submitted fees to the Judicial Administrator for the Supreme Court of the State of Kansas. K.S.A. 22-4507 (1977 Supp.) and Kansas Supreme Court Rules 403 and 404 provide: 1) that compensation be made according to standards adopted by the state board of supervisors of panel to aid indigent defendants, 2) the board is specifically authorized to reduce payment for submitted fees on a pro rata basis if anticipated revenue for any year is insufficient to pay full claims, and 3) the judicial administrator may request a review of the reasonableness of the amount of any claim by the board and a corresponding adjustment.

Also, on appeal petitioner challenged the recoupment procedures under K.S.A. 22-4513 (1977 Supp.) whereby a demand was made upon him for the amount expended in payment for his court-appointed counsel and a judgment was entered against him for that amount on August 1, 1977.

REASONS FOR NOT GRANTING THE WRIT

I. Petitioner's Counsel's Assertion of a Constitutional Right to Compensation at Full Amount of Submitted Claim to State Judicial Administrator for Court-Appointed Services Is Frivolous, and Petitioner Lacks Standing to Assert Such a Claim.

Applicable state law, K.S.A. 22-4507 (1977 Supp.), grants the board of supervisors of the state aid to indigent defendants panel a certain flexibility in the payment of claims submitted by court-appointed counsel. The statute authorizes the board to set standards and limits to the payment of such claims and considering the balance and anticipated revenues to allocate less than full payment on a pro rata basis if revenues for any year are insufficient to pay the full amount of submitted claims.

Further, section 22-4507 empowers the Supreme Court of Kansas to adopt rules governing the processing and payment of such claims. The State Supreme Court had adopted such rules (i.e., Rules 403, 404). These rules pro-

vide for the detailed review of the amount and reasonableness of the submitted claim and require the approval of the judge (of the court) in which the services were performed. The judge or magistrate is given authority to reduce the claim. Further, upon the judicial administrator's or claimant's request, the reasonableness of the submitted payment may be reviewed and adjusted by the board of supervisors.

In the face of this clear statutory language counsel for the petitioner presents the novel claim that there exists a constitutional right to compensation for his court-appointed services at a certain level, which he has unilaterally determined and submitted for payment. Although it is not entirely clear, it seems to be his contention that compensation at this level is not necessarily due in all cases, but only those cases where the original prosecution was "unlawful." Counsel apparently concludes that the original prosecution was unlawful because a trial court's denial of his motion to dismiss was reversed on appeal, the state appellate court accepting his asserted construction of the involved statutory provisions.

Respondent is not only confused as to the source of this alleged constitutional right, but also as to whom this right inures. This is an appeal from a state criminal conviction, reversed on appeal to the Kansas Supreme Court. Despite reversal of his conviction, petitioner, the criminal defendant, makes application to this Court to reverse certain ancillary conclusions of the Kansas Supreme Court dealing with the payment and recoupment of fees of court-appointed counsel.

Here the asserted right is to payment for court-appointed services at a specified level. It seems clear if such a right exists, its benefits flow not to the petitioner but to his counsel. It is axiomatic that a constituitonal

issue cannot be treated by a court merely because it is raised by a party requesting resolution. The petitioner seeking relief must demonstrate the practice in question affects a personal interest. *United States* v. *Richardson*, 418 U.S. 103 (1969). Petitioners must not only show they are personally injured by the contested practice, but also that this injury is real and immediate. *Schlesinger* v. *Reservists*, 418 U.S. 208 (1974); *Golden* v. *Zuicker*, 394 U.S. 103 (1969).

Here the petitioner, a criminal defendant, has no immediate personal interest in the amount at which his court-appointed counsel is compensated. This is an issue between his counsel and the state authorities. An asserted right to compensation at a specific level for court-appointed services, however attenuated, is personal to the attorney. A criminal defendant on direct appeal of his criminal conviction has no standing to assert such a right. If counsel for defendant wishes to raise this issue he should do so in 42 U.S.C. §1983, asserted in his own interest either in the federal or state courts.

Nor should petitioner be heard to contend that this right to compensation is personal to his right to counsel under the Sixth Amendment. Any connection between the asserted right to compensation and Sixth Amendment is too remote to establish a concrete personal interest. Clearly the issue of compensation under Kansas procedures occurs after the service is provided and disputes as to the proper level of compensation after the fact could not in any way affect the petitioner's right to the services. It is equally certain that premised on this state practice the petitioner may not assert any chilling effect on his right to counsel in the future. One may not assert a constitutional claim on the premise that one may be injuriously affected in the future. *O'Shea* v. *Littleton*, 414

U.S. 488 (1974). Further, any hesitancy of future counsel to accept appointment over the uncertainty as to his expected level of compensation, one, is likely not to be found as sufficient reason to be excused from this responsibility imposed by a court and the legal profession, and two, in any event would not affect the defendant's absolute right to ultimately be represented by counsel.

It is curious to note the almost total absence of case authority presented in support of the petitioner's contention in this regard. The reason is simple, there is none. The asserted interest is a tenuous abstraction completely without support in decisional law and constitutional theory. The issue was cogently analyzed in the lower court opinion of the Kansas Supreme Court:

> "The thrust of defendant's argument is that he has a constitutional right to have his defense counsel adequately compensated, particularly in a case where the prosecution was 'unlawful.' We find no support for the argument.
>
> It is the moral and ethical obligation of the bar to make representation available to the public. (See Canon 2, Code of Professional Responsibility, 220 Kan. ex.) Quite often, fulfillment of that obligation involves the representation of a client, particularly a criminal defendant, for little or no remuneration. Enactment of K.S.A. 22-4501, *et seq.*, has served to relieve some of the hardships involved in fulfilling an attorney's obligation to provide legal representation to the public; but it has not cancelled the attorney's ethical responsibility to provide representation without compensation if necessary. Court appointed counsel has no constitutional right to be compensated, much less to receive full and adequate compensation which may have been received if the same time had been spent on a fee-paying client's problems. (See, *United States* v. *Dillon*, 346 F.2d 633 [9th Cir. 1965].)" *State* v. *Keener*, 224 Kan. 100, 102 (1978).

There is no support in law for the petitioner's theory of constitutional relief and it is unlikely he would prevail on the merits. Further, respondent contends regardless of the substantive merits of his contention the petitioner lacks standing to assert the alleged interest.

II. The Kansas Recoupment Procedures and the Decision of the Kansas Supreme Court in This Action Are in Accord With Applicable Decisions of This Court and Lower Federal Decisions.

Petitioner argues the recoupment practice under K.S.A. 22-4513 (1977 Supp.) is unconstitutional. This argument is premised on two grounds. First, petitioner contends that recoupment practice is unconstitutional in his particular case, because his original prosecution was "unlawful." Secondly, petitioner asserts that under the due process clause he is entitled to a hearing prior to the entry of judgment. Neither are persuasive.

The practice of recouping from criminal defendants attorney's fees and other legal expenses provided at state expense because of indigency is common among the various states, though the statutory procedures vary widely. [See *James* v. *Strange*, 407 U.S. 128, at 132 (1972)]. Some allow the repayment of such expense to be a condition of sentence or probation, others such as Florida deem the debt to be a perpetual lien against the defendant's real and personal property. Some specifically assess costs only against convicted defendants, although the majority apply the recoupment provisions regardless of the outcome on the merits of the criminal prosecution.

Kansas recoupment procedures have experienced an eventful history within the courts. In 1971 a three-judge Federal District Court panel declared the existing recoupment provisions under K.S.A. 22-4513 unconstitutional. *Strange* v. *James*, 323 F. Supp. 1230 (1971). The sweeping language of that opinion indicated that any attempt to compel indigent defendants to repay the state for legal services provided would impermissibly chill the right to counsel under the Sixth Amendment and the Supreme Court decision of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

On appeal to the United States Supreme Court, a unanimous court held that there was no denial of right to counsel in the strictest sense, and expressly refused to treat the general question of whether recoupment statutes making repayment obligatory impermissibly infringe on the right to counsel, finding the statute unconstitutional on the separate grounds. The court held that failure of the state to afford indigent defendants the same protections afforded other civil judgment debtors violated the strictures of the Equal Protection Clause. It expressly declined to make any pronouncement on the validity of recoupment statutes generally. *James* v. *Strange*, 407 U.S. 128 (1972).

In 1974, the U.S. Supreme Court again addressed the issue of recoupment, in passing on the validity of Oregon procedures under Oregon Rev. Statutes §161.665. At this time, however, the Court considered the Sixth Amendment question forming the basis of the lower court decision in *Strange* v. *James, supra.* The Court expressly rejected the reasoning of the three judge panel in that case. *Fuller* v. *Oregon*, 417 U.S. 40 (1974).

The Oregon statutes provided [Oregon Rev. Statutes §161.665] that a convicted defendant provided legal services at the state expense due to indigency may be obli-

gated to reimburse the state if such a condition is imposed in sentencing the defendant or as a condition of probation. Payment was to be made according to any terms specified by the court and if no terms are specified the payment was due forthwith. If the defendant refused to pay or failed to make any good faith effort, he was subject to contempt charges which provided for incarceration upon order of the court for up to one day for each $25, but not exceeding one year or for revocation of probation. In addition, the statute conditioned the authority of the court to require such recoupment upon a determination that the defendant was able to pay, and also provided procedures for the defendant to petition the court for a remission of payment obligations if they imposed manifest hardship. The petitioner was obligated to repay attorney's fees and expenses incurred by a criminal investigator as condition to a five-year probation and placement in a work-release pro am.

This court in *Fuller* concluded that various state and federal district court opinions holding the imposition of an obligation to repay placed upon an indigent defendant to impermissibly chill the Sixth Amendment right to counsel were "wide of the constitutional mark". *Fuller* at 52. The court observed that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) required only that indigent defendants be afforded an opportunity for counsel even though they do not have the present financial ability to retain one. It further concluded that procedures, such as the one outlined in the Oregon statutes, which provide a present absolute right to court-appointed counsel but may in the future impose an obligation to repay the state for expenses incurred in providing legal assistance, adequately comply with these requirements and do not infringe on the defendant's constitutional right to counsel. *Fuller* at 53.

The *Fuller* decision also addressed the equal protection issues raised by state recoupment procedures. The court held that as long as exemptions accorded other civil judgment debtors generally are provided defendants from whom recoupment is sought, the procedures are free from any equal protection infirmities.

Since the *Fuller* decision, a number of state and federal court decisions have affirmed the validity of a variety of recoupment procedures. *Smith* v. *Lees,* 431 F. Supp. 923 (1977); *United States* v. *American Theatre Corporation,* 526 F.2d 48 (1975); *People* v. *Amor,* 12 Cal. 3d 20, 523 P.2d 1173 (1974); *Washington* v. *Barklund,* 87 Wash. 2d 814, 557 P.2d 314 (1977). As mentioned previously, recoupment procedures vary widely from state to state, and courts applying *Fuller* have grafted various requirements onto the decision in particular circumstances as a prerequisite to a holding of validity.

Regardless of these varying decisions, the law regarding recoupment practices post *Fuller* could be appropriately summarized as follows: 1) recoupment practice does not violate the Sixth Amendment right to counsel as long as an indigent defendant in lieu of prosecution is given the present, absolute right to counsel, 2) such procedures do not offend equal protection of the law if the indigent has the same exemptions available to other civil judgment debtors, and 3) the procedures must be essentially fair and not impose a manifest hardship on an indigent defendant without adequate resources to pay.

The recoupment scheme contemplated by the Kansas statutes admittedly is of a different genre than Oregon procedures approved in *Fuller.* The Oregon procedures made recoupment a discretionary act of the trial court judge in imposing criminal sentence. Repayment could be made a condition of probation or a direct part of the

sentence, such as a fine. If a defendant refused to or failed to pay, he or she would be subject to contempt charges which provided for incarceration for up to one day for each $25. In these circumstances the Oregon statutes conditioned the authority of the trial court to impose recoupment upon a determination that the defendant was able to pay, and also provided procedures for the defendant to petition the court for a remission of payment obligations if they imposed manifest hardship.

The Kansas procedures represent an entirely different approach although in substance they provide equal if not greater protections than the Oregon procedures. Recoupment under the Kansas scheme is essentially a civil debt collection procedure and not primarily an adjunct to the criminal sentencing authority of the trial court.

In this light, the court should be apprised of the existence of a separate Kansas statute dealing with the sentencing authority of trial court judges authorizing the judge to impose repayment of such expenditures as a condition of probation. K.S.A. §21-4610(k). The constitutionality of K.S.A. §21-4610(k) was not raised as an issue in this case. Nor is plaintiff subject to the terms of that statute since he is not serving a term of probation. Therefore, plaintiff would have no standing to challenge the effect of K.S.A. §21-4610(k). Moreover, should a revocation of probation be attempted under K.S.A. §21-4610(k) for failure to reimburse the State, such a determination would be preceded by the full panoply of procedural safeguards set forth in K.S.A. §22-3716.

The procedure must be viewed in its totality to appreciate its reasonableness. Clearly petitioner is in error when he argues that judgment under this practice is entered without the intervention or supervision of a judicial officer. Submission of fees by court-appointed counsel

must in the first instance be reviewed by the trial court judge or other judicial officer before whom the services were rendered. The procedures provided for an automatic entry of judgment upon submission to the clerk of the local court by the judicial administrator of an abstract of judgment sixty days after a demand has been served on the defendant. K.S.A. 22-4507. As contemplated by Kansas Supreme Court Rule 403, this judge or magistrate reviews these claims as to their authenticity, reasonableness, and amount and has full authority to reduce the amount of counsel's submitted claim. Further, the judicial administrator, upon his own initiative may request the Board of Supervisors to review the amount of any submitted claim. Once judgment is entered the indigent defendant has all the exemptions and protections available any other civil judgment debtor, impoverished or otherwise.

Thus, recoupment in the first instance is conditioned on the trial judge's determination that services were provided and the submitted charges are reasonable. The defendant is thereby notified of his obligation for the incurred expenses. Should the indigent defendant lack the resources to pay the amount, the matter would progress in normal fashion to the entry of civil judgment against the defendant upon the debt owed. At this point the defendant is on equal footing with any debtor who has judgment entered on a legitimate debt. If he lacks the financial resources to satisfy the judgment, just as an impoverished civil debtor, he will be guarded from overreaching and manifest hardship by the full panoply of exemptions available judgment debtors generally under the Kansas Code of Civil Procedure. See *Stroinski* v. *Office of Public Defender*, 134 N.J.Super. 21, 338 A.2d 202, 209 (1975). This adequately complies with the requirement of *Fuller*. Certainly there is no reason in the law or specifically the Constitution why indigency should preclude the entry of judgment on a bona fide civil debt.

The Kansas legislature, exercising its general powers of government, has determined that though an indigent defendant charged be given a present absolute right to representation, he is obligated to the State for the cost of such services. Contrary to popular expectation, these services are not free, and there exists no compelling reason in law or public policy why such services should be borne exclusively by the public treasury where the beneficiary has adequate resources to bear the expense. The existence of the debt cannot be controverted, since the trial court judge approves the authenticity of the service and reasonableness of the fee charged. Thus the state has established streamlined procedures apart from the ordinary legal process for the collection of the debt. The statutes, of various states, including Kansas, are replete with examples of such summary legal procedures applicable in specific circumstances. Enforcement of the judgment would be impossible unless the defendant has sufficient resources. If he does he should not be heard to complain since his assertion of indigency under such circumstances is not warranted.

III. The Kansas Recoupment Procedures Adequately Comply With the Requirements of Due Process.

The petitioner contends that Kansas recoupment practice offends the dictates of the due process clause in that it allows the entry of civil judgment against the defendant without a prior hearing. In support of this contention he sights. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and *North Georgia Finishing Co.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). His reliance on this authority is misplaced, and his assertion goes well beyond the holdings of these and other decisions of this Court.

The above line of authority holds only that a debtor must be afforded a hearing prior to or in close proximity

to the seizure of any property, and does not support any absolute right under due process to a hearing prior to judgment in all instances. See *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974).

Indeed cases which have addressed the precise issue raised by the petitioner have held that summary recoupment procedures need not necessarily grant a defendant the right to hearing before the amount owed becomes enforceable as a judgment lien. *U. S.* v. *Durka*, 490 F.2d 478 (7th Cir. 1973); *Stroinski* v. *Office of Public Defender*, 134 N.J.Super. 21, 338 A.2d 202, 209 (1975).

Here the procedures grant notice of existence of the debt sixty days prior to any administrative action taken by the judicial administrator. As the Kansas Supreme Court has indicated implicit within this sixty day delay is the right to object to the judicial administrator. The judicial administrator has authority to request review of the claim by the board of supervisors. As mentioned previously the existence of the debt can hardly be disputed, since the judge before whom the services were rendered must verify the authenticity and reasonableness of counsel's claim prior to payment by the state.

After the amount paid out is entered as a judgment against the defendant, the right to a hearing is present when the state attempts to collect the judgment by garnishment or execution. K.S.A. 60-718(c), K.S.A. 60-259 (f), and K.S.A. 60-260(b). Under section 60-260(b) generally, and 60-260(b)(6) specifically the defendant has the right to assert a request for relief from the operation of any final judgment for any reason which he claims should justify such an action. This presumably would authorize the defendant to present any grounds for relief not theretofore asserted.

Petitioner further asserts a due process flaw in the recoupment procedures in that they create an irrebuttable

presumption which assumes a fact to be universally true which is not necessarily so, and that there are reasonable alternative means of decision making. See *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974).

First, it is not entirely accurate to identify the operation of questioned recoupment procedures as an irrebuttable presumption. The facts allegedly presumed, the existence of the services and reasonableness of the charge, are not conclusively presumed but require an independent finding to that effect by the trial court judge. On these findings and payment of the fee, Kansas law conclusively imposes the obligation of repayment. Any assumptions inherent in this process are reasonable and not arbitrary or capricious. There seems little question under the procedures that the services were provided and the charges were approved. Under such circumstances the Kansas legislature has determined the indigent defendant will be obligated to repay the amount expended, though enforcement of the state's debt will be delayed till sufficient resources in the form of non-exempt property are available.

Petitioner would cry that fairness demands when an indigent defendant is acquitted the state bear the brunt of the expenses it has unlawfully imposed. Such an appeal is not compelling in logic or policy. The Kansas legislature has determined that indigent defendants, should they acquire sufficient resources in the future, should be on no different footing than ordinary defendants.

If indigent defendants accrue a right to free legal services, upon acquittal, regardless of future ability to pay, under his rationale should not a like privilege be afforded ordinary defendants who are acquitted. Clearly acquittal will not excuse a defendant from an obligation to pay his privately retained counsel, and there is no compelling reason in law or equity why it should therefore excuse an obligation to repay the State for court-appointed counsel.

CONCLUSION

The Kansas legislature has elected to condition the state service of providing court-appointed counsel on the imposition of an obligation to repay. The recoupment of such expenses is a legitimate concern of government, and it has not been implemented in a manner which is arbitrary or capricious. Pursuant to *Fuller* it seems beyond contention that such procedures do not impermissibly burden the right to counsel and do not offend equal protection. Further, the Kansas procedures effectively prohibit any enforcement of the obligation in any circumstance which would impose a manifest hardship.

Petitioner's assertion of a pressing need for this Court's intervention premised on a conflict of federal authority is without merit. There is no conflict in authority. Federal cases cited as evidence of such, are cases largely interpreting the Federal recoupment statute, and not constitutional parameters to state recoupment schemes.

For the reasons set forth in the body of the argument, the Kansas recoupment scheme adequately complies with this Court's definitive pronouncement on this issue in *Fuller* v. *Oregon, supra.* There are no constitutional infirmities, due process or otherwise, and this Court should in its sound discretion deny this request for review.

Respectfully submitted,

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